UNITED
NATIONS

E

Economic and Social
Council

Distr.
GENERAL

E/CN.4/Sub.2/1991/45
28 August 1991

Original: ENGLISH

COMMISSION ON HUMAN RIGHTS
Sub-Commission on Prevention of
Discrimination and Protection
of Minorities
Forty-third session
Agenda item 19

THE RIGHT OF EVERYONE TO LEAVE ANY COUNTRY, INCLUDING HIS OWN, AND TO RETURN TO HIS COUNTRY

Report of the Working Group on a draft declaration on freedom and non-discrimination in respect of the right of everyone to leave any country, including his own, and to return to his country

Chairman-Rapporteur: Mr. Asbjørn Eide

GE.91-13367/3622B

INTRODUCTION

1. The Sub-Commission on Prevention of Discrimination and Protection of Minorities, at its forty-first session, adopted resolution 1989/25 of 31 August 1989. By this resolution, the Sub-Commission decided to establish at its forty-second session a sessional open-ended working group with a view to preparing a revised version of the draft declaration on freedom and non-discrimination in respect of everyone to leave any country, including his own, and to return to his country. By the same resolution, the Sub-Commission requested the Secretary-General to prepare an analytical compilation of the comments on the draft declaration received from Governments, specialized agencies, intergovernmental and non-governmental organizations and of the comments made by the members of the Sub-Commission.

2. The draft declaration emanates from the work of the Special Rapporteur, Mr. C.L.C. Mubanga-Chipoya, who presented his final report on the question to the fortieth session of the Sub-Commission in 1988 (E/CN.4/Sub.2/1988/35 and Add.1 and Add.1/Corr.1).

3. The Working Group held three meetings during the forty-second session of the Sub-Commission, on 7, 8 and 14 August 1990; its report is contained in document E/CN.4/Sub.2/1990/48. At that session, the Sub-Commission adopted decision 1990/123 of 31 August 1990 in which it decided to ask Mr. W. Sadi to prepare, without financial implications, a revised version of the draft declaration taking into account the discussion in the open-ended Working Group at its forty-second session and the comments and proposals contained in the note of the Secretary-General prepared pursuant to resolution 1989/25 (E/CN.4/Sub.2/1990/47), and to submit this revised version to the Sub-Commission at its forty-third session in 1991.

ELECTION OF OFFICERS

4. At the forty-third session of the Sub-Commission, the Working Group consisted of the following members: Mr. Alfonso Martínez, Mrs. Attah, Mr. Eide, Mr. Al-Khasawneh and Mr. Maxim. At its 1st meeting, on 22 August 1991, the Working Group, on the proposal of the outgoing Chairman-Rapporteur, Mr. Alfonso Martínez, elected Mr. Eide by acclamation as Chairman-Rapporteur. The Working Group met only for 90 minutes due to the heavy agenda of the Sub-Commission.

PARTICIPATION

5. Other members/alternates of the Sub-Commission who took an active part in the deliberation were Mr. Carey, Mr. Chernichenko, Mr. Flinterman and Ms. Ksentini.

GENERAL DEBATE

6. The Chairman-Rapporteur informed the Working Group that Mr. Sadi had been unable to prepare a new consolidated draft of the declaration which could have served as a basis for the Group's work. Following informal consultations with

several members, the Chairman-Rapporteur prepared a new consolidated draft in collaboration with Mr. Flinterman. It had been submitted the day before the meeting to the Secretariat for reproduction and translation, and was consequently available only as a photocopied information paper. In addition to that draft, Mr. Alfonso Martínez had prepared a list of amendments which would also be translated and distributed, but at present were only available as photocopies. It was agreed, following a proposal to that effect by Mr. Alfonso Martínez, that the paper by Mr. Eide and Mr. Flinterman (E/CN.4/Sub.2/1991/WP.2) would serve as the basis of the Group's work, together with the amendments presented by Mr. Alfonso Martínez (annex I) and the draft presented by Mr. Mubanga-Chipoya should also be taken into account (annex II).

7. The Chairman-Rapporteur pointed out that, in view of the very limited time available during the session, there was no possibility of making major advances in the drafting. Furthermore, there seemed to be some basic and controversial policy issues to be examined, relating in particular to the scope of application of the draft declaration. While he was aware that there was a widespread desire to see the preparation of the draft accelerated, this could in his opinion be done only after those policy issues had been clarified. His own opinion was that the framework of the declaration should be article 13, paragraph 2, of the Universal Declaration of Human Rights: "Everyone has the right to leave any country, including his own, and to return to his country". He was aware, however, that others felt that recent developments called for a broader scope. He therefore suggested that instead of using the limited time to attempt detailed drafting, the brief session could be used to identify the main areas of dispute. This approach was supported by the members of the Working Group.

8. The Chairman-Rapporteur pointed out the main differences between the new consolidated draft and that of Mr. Mubanga-Chipoya as follows:

(i) In the title of the draft declaration, the words "return to one's own country" had been replaced by "enter one's own country";

(ii) The present draft put nationals and permanent residents on an equal footing;

(iii) After the word "permanently" in article 3, the following words were added:

"and shall refrain from preventing, even indirectly, nationals of other States from leaving their countries of origin";

(iv) Article 7 of the Mubanga-Chipoya draft regarding restrictions on the right to leave had been transferred to article 12 (part IV of the draft declaration on restrictions on the right to leave or enter);

(v) Preambular paragraph 6 citing article 29 of the Universal Declaration of Human Rights had been deleted.

9. The Chairman-Rapporteur pointed out that in the draft given to the Secretariat, some corrections had been made which were not yet included in the photocopied version available in the room. The most important was that the word "permanent" should be used before the word "resident" where that word occurred.

10. Regarding the scope of the declaration, it was his understanding that since it was intended basically to cover the area foreseen by article 13, paragraph 2, of the Universal Declaration. It would not cover questions relating to entry into a country which was not one's own (except, possibly, the question of return of a permanent resident to his country of residence). Nor would issues relating to the expulsion of aliens, in his understanding, fall within the scope of the declaration. While such issues were important at the present time and might require examination by the United Nations human rights bodies, he felt that they should be taken up in a context separate from the Declaration, which had a limited scope.

11. One member raised the question of double nationality, and referred in that connection to the test of "effective link" by the International Court of Justice in the Nottebohm case handed down by the Court in 1955. He also took up the question of the collective right to enter, arguing that a right held by an individual could also be exercised collectively by a group of such individuals. He recalled in that connection that that aspect was clearly addressed in the Mubanga-Chipoya study. Most members agreed to include permanent residents along with nationals, but one participant queried this and called for further discussion on that point.

12. One member of the Sub-Commission preferred the Declaration to cover all aspects of freedom of movement across borders, in its individual and collective aspects. The right to return should also apply to those who were deprived of it, such as the Palestinians. Also with regard to the right to return (art. 10) she wanted an inclusion corresponding to the UNHCR proposal (E/CN.4/Sub.2/1990/47, E.Part III, Article 10 (b)), according to which the right to return must be exercised in conditions of safety and dignity, and should not be subject to any recriminations on return arising solely out of the fact of departure, and repatriation should be voluntary. Her second point was that the declaration should be broadened to deal also with entry into a country which was not one's own, since the right to leave would be very difficult or impossible when there was no place to enter. The declaration should at least contain requirements that such access should not be subject to discrimination on the basis of race, sex, national origin or on related grounds. Finally, the same expert expressed concern that the phrase "social need" in article 12 (c), could be used to cover up what might in fact be racial discrimination.

13. A member of the Working Group suggested adding restrictions to the rights contained in parts I, II and III, instead of including all restrictions in a general article in part IV. Another member of the Sub-Commission asked why the Working Group had not continued from where it had left off in 1990, when article 1 had been adopted and articles 2 and 3 had been adopted provisionally with several brackets. The Chairman-Rapporteur responded by pointing out

that, because of the very limited time available, it had been found desirable to concentrate on the identification of the major issues which needed examination.

14. One member of the Working Group questioned whether major criminals, particularly those who had committed crimes against humanity, who wanted to return would be covered by the declaration, and whether they could request pardon if they returned. The Chairman-Rapporteur replied that the first question fell within the issue of restrictions in draft article 12, and the second would depend on the application of national legislation but would not be affected by the declaration.

15. Summing up, the Chairman-Rapporteur stated that two sets of issues had been brought up. One of them could be handled within the framework of the scope set by article 13, paragraph 2, of the Universal Declaration which had been the starting base of the declaration. That included the question of return of major criminals, the question of return of refugees in accordance with the UNHCR proposal, the question of "social need" in article 12 (c), the question brought up by one member of the Working Group on where to place the provisions on restrictions, and the issue of double nationality. Given more time, the Working Group would in all likelihood be able to solve those issues. There were, however, some other issues which were of a more basic policy nature since they related to the scope of the declaration. It was possible to rank those issues on an ascending scale concerning the degree to which they would broaden the scope. The first issue was whether to use the words "right to return to one's own country" or "the right to enter one's own country". The latter, used in article 12, paragraph 4, of the International Covenant on Civil and Political Rights was broader than the former, used in article 13, paragraph 2, of the Universal Declaration. The second issue was whether or not to include (permanent) residents on the same level as nationals with respect to the right to return (enter). Some might argue that "one's own country" could be construed to encompass also one's country of permanent residence, but it was not uncontroversial. A much wider expansion of the scope would result if the Declaration also dealt, if only for purposes of preventing discrimination, with the question of the right to enter a country which was not one's own, neither as a national nor as a permanent resident. That would constitute international restrictions on national immigration laws and regulations, which many States might not be ready to accept. A separate issue, which was also possibly a major policy issue, concerned the collective right to enter.

16. The Working Group discussed three options for future work:

(a) One more formal meeting during the current session of the Sub-Commission;

(b) An informal meeting during the current session;

(c) An intersessional meeting.

Most members favoured the last approach, provided that such an intersessional meeting did not immediately precede the forty-fourth session of the Sub-Commission.

Draft amendments submitted by Mr. Alfonso Martínez to the new consolidated draft declaration submitted by Messrs. Eide and Flinterman on 12 August 1991

A. The title of the draft declaration should follow, as closely as possible, the one proposed by the Special Rapporteur. Consequently, the following is suggested:

DRAFT DECLARATION ON FREEDOM AND NON-DISCRIMINATION IN THE EXERCISE OF THE RIGHT OF EVERYONE TO LEAVE ANY COUNTRY, INCLUDING HIS OWN, AND TO RETURN TO HIS COUNTRY

B. The preamble should read as follows:

1. Reinstate the words "and of nations large and small" in line 4 after the words "rights of men and women" (as proposed by the Special Rapporteur) and delete the word "and" in the third line of the new consolidated text.

2. No changes.

3. The text should read as follows:

"Recognizing that the promotion, protection and actual implementation of all the human rights and fundamental freedoms of all individuals in every society is necessary to ensure the development of every country and constitutes an important element in the development of friendly relations and cooperation among all States."

4. Delete the words "the fundamental principle, based on general international law", and substitute "to return" for "to enter".

5. The text should read as follows:

"Considering that the actual implementation of the right of every individual to leave any country, including his own, and to return to his own country may contribute to foster mutual understanding, cooperation and beneficial exchanges among the peoples of the world so they may eradicate intolerance, racial discrimination and xenophobia and live together in peace as good neighbours."

6. Reinstate, with a small change, the text proposed by the Special Rapporteur. This paragraph should read as follows:

"Recognizing that pursuant to article 29 of the Universal Declaration of Human Rights every individual has duties to himself and to his family as well as to the community in which he lives and in which alone the full and free development of his personality is possible."

7. Substitute the words "may be the cause" for "is the cause" in the first line of the new consolidated text.

8. The text should read as follows:

"Recognizing that this right can only be effectively guaranteed by means of its recognition in national legislation consistent with the international obligations acquired by the respective State and full international cooperation, particularly the implementation in good faith of bilateral and multilateral instruments in the field of migration."

9. Substitute "to return" for "to enter" (line 4);

- Substitute "in the exercise of this right" for "in respect of these rights";

- Add the words "to cooperate in" after the words "urges all nations" (line 5);

- Delete the words "elaboration" and "enforcement" (line 6);

- Add the word "actual" before the word "implementation" (line 6);

- Substitute the words "standards and collaboration" for the word "machinery" (line 8); and

- Substitute the word "instruments" for the words "laws and processes".

10. Add a new paragraph (preferably after para. 2 of the new consolidated text) which would read as follows:

"Whereas the Charter establishes that the United Nations shall promote higher standards of living, full employment and conditions of economic and social progress and development through joint and separate action of all its members in cooperation with the Organization based on respect for the principle of equal rights and self-determination of peoples."

C. The operative part should read as follows:

PART I - GENERAL PROVISIONS

Article 1 Substitute the word "before" for the word "enter" (line 2), as adopted by the Working Group in 1990.

Article 2 The text should read as follows:

(a) Every State shall adopt such legislative and other measures as may be necessary to ensure the full and effective [universal] implementation of this right and the principles included in this declaration;

(b) Every State shall refrain from adopting legislative and other measures which directly or indirectly may actually hinder, impede or restrict the right of everyone to leave any country, including his own, or to return to his own country;

(c) A State whose territory a person wants to leave shall not be considered as hindering, impeding or restricting this right if another State, whose territory said person intends to enter, refuses him entry;

(d) All legislative and other provisions affecting this right and principles shall be published and made easily accessible;

(e) The conditions and limitations for the exercise of this right and the implementation of these principles are those established by the domestic legislation of every State in accordance with the provisions of the Universal Declaration and its international obligations. Said conditions and limitations shall be the same for all citizens under the jurisdiction of the respective State;

(f) In the exercise of this right, aliens enjoying the status of temporary or permanent residents shall be subjected to the provisions of the legislation in effect in their country of residence and of the bilateral or multilateral instruments governing their status and the rights inherent to it.

Annex II

DRAFT DECLARATION ON FREEDOM AND NON-DISCRIMINATION IN RESPECT OF THE RIGHT OF EVERYONE TO LEAVE ANY COUNTRY, INCLUDING HIS OWN, AND TO RETURN TO HIS COUNTRY

Preamble

Whereas the peoples of the United Nations in the Charter solemnly reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and expressed their determination to promote social progress and better standards of life in larger freedom,

Whereas the Charter declares that it is one of the purposes of the United Nations to promote and encourage universal respect and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

Recognizing that respect for human rights and fundamental freedoms is essential for peace, justice and well-being and is necessary to ensure the development of friendly relations and cooperation among all States,

Recalling that the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination, as well as regional conventions, recognize the fundamental principle, based on general international law, that everyone has the right to leave any country, including one's own, and to return to one's own country,

Emphasizing that the right of everyone to leave any country and to enter one's own country is indispensable for the full enjoyment of all civil, political, economic, social and cultural rights and the free and untrammelled exercise of this right is a sure means of fostering mutual understanding, cooperation and beneficial exchanges among the peoples of the world so that they may practise tolerance and live together in peace as good neighbours,

Recognizing that an individual has duties to himself and to his family as well as to the community in which he lives and in which alone the full and free development of his personality is possible,

Concerned that the denial of this right is the cause of widespread human suffering, a source of international tensions, and an object of international concern,

Whereas this right can only be effectively guaranteed when formally acknowledged in national law consistent with the principles of the Charter of the United Nations, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights,

Now therefore the following principles are hereby proclaimed as of universal application to ensure recognition and enjoyment of the right of everyone to leave any country, including his own, and to return to his country, and other related rights, and to prevent discrimination in respect of these rights and urges upon all nations the elaboration, implementation and enforcement of the following principles through effective international machinery and international laws and processes.

PART I - GENERAL PROVISIONS

Article 1

Everyone has the right to leave any country, including one's own, and to enter one's own country, without distinction as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, marriage, age (except for minors not sui juris independently of their parents) or other status.

Article 2

(a) Every State shall adopt such legislative or other measures as may be necessary to ensure the full and effective enjoyment of the rights set forth in this Declaration.

(b) All laws, administrative regulations or other provisions affecting the enjoyment of these rights shall be published and made easily accessible.

(c) The conditions prescribed by law or administrative regulations for the exercise of this right shall be the same for all nationals of a country.

PART II - RIGHT TO LEAVE

Article 3

Every State shall recognize, implement and enforce the right of any person to leave its territory, temporarily or permanently.

Article 4

In the implementation of the right to leave every State shall prevent adverse economic consequences through the "brain drain" and shall make bilateral and multilateral arrangements for the benefit of the developing countries concerned.

Article 5

No person nor members of his family shall be subjected to any sanction, penalty, official or unoffical reprisals or harassments for seeking to exercise or for exercising the right to leave a country, such as acts which adversely affect, inter alia, employment, housing, residence status of social, economic or educational benefits.

Article 6

(a) No person shall be required to renounce his or her nationality in order to leave a country, nor shall a person be deprived of nationality for seeking to exercise or for exercising the right to leave a country.

(b) No person shall be denied the right to leave a country on the grounds that that person wished to renounce or has renounced his or her nationality.

Article 7

(a) No restriction may be imposed on the right to leave any country including one's own or to enter any country except those which are:

(i) Provided by law;

(ii) Necessary to protect national security, "public order" (ordre public), public health or morals or the rights and freedoms of others;

(iii) Consistent with internationally recognized human rights and other international legal obligations.

Any such restriction shall be narrowly construed.

(b) Any restriction on the right to leave shall be clear, specific and not subject to arbitrary application.

(c) A restriction shall be considered "necessary" only if it responds to a pressing public and social need, pursues a legitimate aim and is proportionate to that aim.

(d) A restriction based on "national security" may be invoked only if situations where the exercise of the right poses a clear, imminent and serious danger to the State. When this restriction is invoked on the grounds that an individual acquired military secrets, the restriction shall be applicable only for a limited time, appropriate to the specific circumstances, which should not be more than five years after the individual acquired such secrets.

(e) A restriction based on "public order" (ordre public) shall be directly related to the specific interest which is sought to be protected. "Public order" (ordre public) means the universally accepted fundamental principles, consistent with respect for human rights, on which democratic society is based.

(f) "Public health" may be invoked when there is a serious threat to the health of the population or individual members of the population.

(g) "Public morals" may be invoked when it is essential to the maintenance of respect for fundamental moral values of the community.

(h) A restriction based on "the rights and freedoms of others" shall not imply that relatives (except for parents with respect to minors not sui juris), employers or other persons may prevent, by withholding their consent, the departure (entry) or any person seeking to leave (to enter) a country.

Article 8

(a) No fees, taxes or other exactions shall be imposed for seeking to exercise or exercising the right to leave a country, with the exception of nominal fees related to travel documents.

(b) No deposit or other security shall be required to ensure the repatriation or return of any national.

(c) Currency or other economic controls shall not be used as a means of preventing any national from leaving his country.

(d) Any national prevented from leaving his country because of non-compliance with obligations towards the State, or towards another person, shall be allowed to make reasonable arrangements for satisfying these obligations.

Article 9

(a) Any person leaving a country shall be entitled to take out of that country:

(i) His or her personal property, including household effects and property connected with the exercise of that person's profession or skills;

(ii) All other property or the proceeds thereof, subject only to the satisfaction of legal monetary obligations, such as maintenance obligations to family members, and to general controls imposed by law to safeguard the national economy, provided that such controls do not have the effect of denying the exercise of the right.

(b) Property or the proceeds thereof which cannot be taken out of the country shall remain in the possession of the departing owner, who shall be free to dispose of such property or proceeds within the country.

PART III - THE RIGHT TO RETURN

Article 10

(a) No one shall be deprived of the right to enter [to return to] his own country.

(b) The right of everyone to return to his country shall not be subject to any arbitrary restrictions.

(c) No person shall be deprived of nationality or citizenship in order to enforce exile or to prevent that person from exercising the right to enter his or her country.

(d) No entry visa or fees or taxes may be required to enter one's own country.

Article 11

Permanent legal residents who leave their country of residence shall not be denied the right to return to that country except for reasonable cause identical to those applicable under article 6 of this Declaration.

PART IV - THE RIGHT OF A FOREIGNER TO LEAVE THE COUNTRY

Article 12

(a) Every foreigner has the right to leave the country of his sojourn.

(b) Every foreigner, legally within the territory of a country shall not be accorded lesser rights than a national in the exercise of his right to leave that country.

(c) The right of every foreigner to leave the country of his sojourn shall not be subject to any arbitrary restrictions.

(d) No foreigner shall be prevented from seeking the diplomatic assistance of his own country in order to ensure the enjoyment of his right to leave the country of his sojourn.

PART V - TRAVEL DOCUMENTS AND PROCEDURAL SAFEGUARDS

Article 13

(a) Everyone has the right to obtain such travel or other documents as may be necessary to leave any country or to enter one's own country. No one shall be denied such documents and permits.

(b) Such documents shall be issued free of charge or subject only to nominal fees.

Article 14

(a) Any national procedures or requirements affecting the exercise of the rights set forth in this Declaration shall be established by law or administrative regulations adopted pursuant to law.

(b) No State shall refuse to issue the documents referred to in article 12 (a) or shall otherwise impede the exercise of the right to leave, on the grounds of the applicant's inability to present authorization to enter another country.

(c) Procedures for the issuance of the documents referred to in article 12 (a) shall be expeditious and shall not be unreasonably lengthy or burdensome.

(d) Everyone filing an application for any document referred to in article 12 (a) shall be entitled to obtain promptly a duly certified receipt for the application filed. Decisions regarding issuance of such documents shall be taken within a reasonable period of time specified by law. The applicant shall be promptly informed in writing of any decision denying, withdrawing, cancelling or postponing issuance of any such document; the specific reasons therefor; the facts upon which the decision is based; and the administrative or other remedies available to appeal the decision.

Article 15

The right to appeal to higher administrative or judicial authority shall be provided in all instances in which the right to leave or enter is denied. The appellant shall have a full opportunity to present the grounds for the appeal, to be represented by counsel of his or her choice, and to challenge the validity of any fact upon which a denial or restriction has been founded. The results of any appeal, specifying the reasons for the decision, shall be communicated promptly in writing to the appellant.

Article 16

Any person claiming violation of his rights set forth in this Declaration shall have effective recourse to a judicial or other independent tribunal to seek enforcement of those rights.

Article 17

(a) No State may impede communication by any person with an international organization outside the State with regard to the rights set forth in this Declaration. No sanction, penalty, reprisal or harassment may be imposed on anyone exercising this right of communication.

(b) No one shall be hindered in or penalized for communicating with or petitioning the United Nations or other intergovernmental or non-governmental organizations complaining of the denial of the rights set forth in this Declaration or seeking their assistance in the exercise of these rights.

(c) No one shall be penalized for or prevented from communicating with foreign consular or diplomatic officials with a view to obtaining travel documents or permits.

(d) A person who claims to be a national of another State shall not be prevented from seeking the assistance of that State in order to ensure his right to leave or return.

PART VI - FINAL PROVISIONS

Article 18

The enjoyment of the rights set forth in this Declaration shall not be limited because of activities protected under internationally recognized human rights or other international legal obligations.

Article 19

Nothing in this Declaration shall be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at destroying any of the rights set forth herein or at limiting them to a greater extent than is provided for in this Declaration.

Article 20

The present Declaration shall not be interpreted to limit the enjoyment of any human right protected by international law.